No. 13684

# United States Court of Appeals

for the Ninth Circuit.

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UNITED STATES OF AMERICA,

Appellant,

vs.

ASSOCIATED HOTELS (HAWAII), LTD., a Corporation, d.b.a. NIUMALU HOTEL,

Appellee.

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## Supplemental Transcript of Record

Vol 2

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**Appeal from the United States District Court for the District of Hawaii.**



Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—5-22-53

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]


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In the United States District Court for the District Hawaii

Civil No. 1138

UNITED STATES OF AMERICA

Plaintiff,

vs.

ASSOCIATED HOTELS (Hawaii), Ltd., a Corporation d/b/a/ Niumalu Hotel,

Defendant.

## ORAL DECISION

On motion to dismiss and for Summary Judgment, in the above-entitled matter, May 9, 1952.

Before Hon. Delbert E. Metzger, Judge.

Appearances:

BENJAMIN A. PERHAM, JR.,
Special Assistant U. S. Attorney, Appearing for Plaintiff;

LOUIS B. BLISSARD,
Territorial Enforcement Director, Appearing for Plaintiff.

J. RUSSELL CADES, of the Law Firm of SMITH, WILD, BEEBE & CADES,
Appearing for the Defendant;

EDWARD J. COLLINS,
Of the Law Firm of SMITH, WILD, BEEBE & CADES,
Appearing for the Defendant.

(Argument by Edward J. Collins, on behalf of Defendant.)

(Argument by J. R. Cades on behalf of Defendant.)

(Argument by Benjamin A. Perham, Jr., on behalf of Plaintiff.)

(Argument by J. R. Cades on behalf of Defendant.)

The Court: The case in my opinion doesn't warrant a summary judgment in favor of the Defendant or either party. When will you be ready for trial?

* * *

I, Albert Grain, Official Court Reporter, U. S. District Court, Honolulu, T. H., do hereby certify that the above is a true and correct transcript of the oral decision in the above-entitled matter, given in open court on May 9, 1952, by the Hon. Delbert E. Metzger, Judge.

May 11, 1953.

/s/ ALBERT GRAIN

[Endorsed]: Filed May 11, 1953.

[Title of District Court and Cause.]

ORAL DECISION

June 2, 1952.

Honolulu, T. H.

(Court resumed at 9:00 o'clock a.m.)

The Clerk: Civil No. 1138, United States of America versus Associated Hotels, Limited, for further trial.

Mr. Perham: Plaintiff is ready, your Honor.

Mr. Cades: Defendant is ready.

The Court: This morning we were to have argument, isn't that right?

Mr. Perham: That is right.

The Court: All right. You may proceed.

Mr. Perham: Thank you, your Honor. I want to take this opportunity to first very sincerely thank your Honor for the careful and diligent and interested manner in which you have listened to our case, both sides.

The Court: That is unnecessary.

Mr. Perham: We appreciate it very much.

The Court: I have got to pay attention to the case that is on trial.

Mr. Perham: It is a trial of great importance to the government and a lot is involved, and we do appreciate the attention your Honor has given.

(Mr. Perham presented opening argument on behalf of the plaintiff.)

(Mr. Cades presented argument on behalf of the [346*] defendant.)

(Mr. Perham presented closing argument on behalf of the plaintiff.) [347]

* * *

The Court: I haven't experienced at any time that I can remember a more erudite and comprehensive argument of the views of opposing counsel than arose in this case, which are exceedingly complex.

The gist as I gather it of defense counsel's argument is to the impracticability, even the injustice of working under CPR Regulation No. 11. There are faults in it which the administration recognized after it had been in operation less than four months. The defendant and others in his class may not have been in a position at the beginning to have foreseen the difficulties in making an exact compliance. It would no doubt be just one chance in many hundred, operating under that, if they could make a precise compliance as to these percentage rates.

You cannot say they were helpless in the beginning and had no recourse in entering into an effort to comply with it because they did have a right to protest and to be heard in their protest. But in any event, they did enter into an effort to comply with the requirement and accepted a ratio from the performance in the year 1949, and that ratio was 24.33 per cent for cost of materials, leaving 75.67 per cent for other operating expenses and profits. As to whether they actually made any profit or not in the

*** Page numbering appearing at top of page of original Reporter's Transcript of Record.**

first four months compliance period, that is, the first of April to the end of July, [348] I don't know, and it isn't any concern of the Court nor in the case.

At that time there was a new Congressional enactment in the Statute that might or might not have given them relief from any hardships that were contained in the attempted compliance with CPR 11, but the defendant did not make any protest, and entered into a new four months compliance period on the same basis that he had adopted under the first compliance period, even knowing that he had not complied with requirements of CPR 11 during the first four months.

As to the matter of being deprived of the usual profits or percentage of customary profits he had theretofore enjoyed and during this last period of four months I can't see where he—that is, referring to the whole association as "he"—I can't see where he was deprived of any opportunity to make the same profits that he was entitled to under regulation No. 11, and I cannot see any evidence in the case for any need of a roll back of his prices in order to comply. He still had the 24.33 per cent of cost as applied against one hundred per cent, the remaining percentage, or 75.67 per cent, being for other expenses and profits.

The matter of his expenditure for entertaining and other advertising attractions were entirely still in his hands, and they would undoubtedly have affected his profits whether these expenses were kept down or permitted to rise higher than [349] they had been heretofore. It seems to me that it was the

defendant's business and his obligation to see that his operating expenditures were not allowed to grow relatively prohibitive in making his expense costs and profits larger than 75.67 of his gross goods cost. So far as I can see it was the defendant's own election to continue operating during the second period under Regulation No. 11, April 1, 1951, knowing at the time that he had not complied with its requirements for the first period.

So far as I can see from all of the evidence it was reasonably within the ability of the defendant to have made a very close compliance, not a precise compliance, unless by a remote chance that it just happened, but he could have made a reasonably close compliance by reasonable and practical efforts to do so.

He had of his own volition, the evidence shows, taken an inventory of stock on hand every month at the end of the month or before business opened on the opening day of the next following month. The testimony by the person who took the inventory shows that it could be done in two hours or thereabouts and could be done before the opening of business on any day.

So far as the income went, the net proceeds of all sales were on a cash register and accounted for from day to day undoubtedly, or could have been any hour of the day. They [350] were known to the defendant, and it would not have been an impractical nor excessively burdensome thing for the defendant to have, during the last month of any four months period, to have taken several inven-

tories if there had been any need for it in order to make it clear to him just where he stood with relation to this percentage ratio, and it could have been corrected at least to a very close margin.

It is clear to see that it could have been corrected in one of several ways. There is some testimony of a former bartender that his experience at the same bar had been that in the general rush and haste many times of pouring drinks this one ounce jigger was allowed to overflow, and his experience shows that there were but 23 drinks in a fifth of a quart bottle of liquor. Theoretically, the accountant testified I think by actual measurement and by other computations that a fifth of the quart should have yielded 26 drinks, I believe, 25 or 26, and the accountant based his calculations that the proceeds should have been more than they actually were on that basis. Well, there is room for a leakage in the number of drinks that a bottle produced. I think anyone who has any experience, as on the House Committee of a club, would know that there is a big question about that. Some bartenders do get a little bit careless or liberal and just throw in a little bit more. Of course that would furnish one way of equalizing this percentage ratio between 24 and roughly [351] 76 per cent, but so far as the evidence shows there was no effort whatever made after it was known at the end of the first four months period and from month to month on the way there was indication that they were running over their prescribed ratio on the profit side. I can't recall any evidence whatever to show that any corrective

methods were taken. If I am in error on that I would like to have it pointed out to me now by counsel.

Mr. Cades: If your Honor please, so far as the corrective measures that were taken, I don't want to re-argue the case, but the evidence of the accountant still in the business and of the manager shows that by reason of the disparity in the type of things that they sold there was no way they could adjust the price. You can't tell what you are going to sell. The efforts had to do with the lack of ability. I think the words were "we couldn't pre-determine."

In fact, they couldn't during the base period and during the compliance period. It jumped all over the map. But your Honor has ruled.

The Court: What I am saying, though, is that they were conscious of their intake being more than it should have in its percentage ratio with the cost of the liquor goods, and I can't recall and I don't believe there was any evidence submitted that showed that any effort was made to reconcile [352] that.

Mr. Cades: I don't think that is quite accurate, your Honor. The evidence was they could account for it by the fact they had greater control. They knew there was less leakage.

Well, if your Honor comes to the conclusion, if they pick it up as a result of more efficiency, I understand your Honor's ruling is they pay the damages. That is the accounting they made for it.

The Court: I don't deny that, counsel. That all goes back to the inherent fault, and you elucidated

that very completely and thoroughly, I think, the inherent fault in this Regulation 11 that made them go on a percentage basis between the cost of material and the gross receipts. You pointed out that there were many faults. Even the administration admitted there were faults in it and undertook to correct it by establishing some ceiling price or permitting the establishment of a ceiling price to try to cure that. But the defendant here did not avail himself of any opportunity to have ceiling prices fixed on all of these items of sale. He elected to continue under CPR 11.

Mr. Perham: If the Court please, in answer to your question, the question I believe you have in mind, I know of no evidence that indicates anybody being instructed to give a little more drinks, little larger drinks or buy a little better whiskey or lower the price. I know of no evidence myself [353] to that effect.

If that is the question your Honor had in mind, I am not sure, but if it is I think the record is clear on that.

The Court: I remember all those things were mentioned as not having been done, but there may have been other means.

Mr. Cades: I don't know if your Honor's decision goes on the idea that there was something that this proprietor could have done at the end of the four month period other than to change his prices, which I assume is what your Honor said he didn't have to do, or you don't see any roll back. Just as counsel and a member of this bar I don't

know what it is. I mean, your Honor, when your Honor makes findings of fact I am going to ask your Honor to make findings that the prices were the same as during the base period. There is no evidence to the contrary and I think in fairness your Honor will make that finding of fact.

The Court: That is the clear, undisputed evidence, that there was no change during all this eight months period and clear up to December, some time in December.

Mr. Cades: That is right. Therefore, your Honor, all that I say is—you have asked a question about the record. The record shows that the only thing he could have done under the government's theory is to roll back his prices. [354] The prices were maintained. As I say here, he could have dropped the 50 cent mixed drink to 40 cents. Congress said that they can't compel him to do it.

I am not going to reargue that, but when you say the record is void as to what he could have done I say it isn't void. The testimony is that even assuming they had to roll back prices they wouldn't know how to do it because they have evening prices, they have morning prices and they have swimming pool prices.

The Court: Well, there wasn't any roll back. He didn't reduce prices so that there was no roll back there. That is what I am trying to say.

Mr. Cades: But, your Honor, to be in compliance he would have had to roll back. That is the inevitable conclusion.

The Court: He might have had to roll back profits but not prices.

Mr. Cades: Well, I am sorry. I didn't mean to interrupt the ruling of your Honor. You asked a question, and I beg your Honor's pardon.

The Court: I don't know that there is any difference between us there because it is clear from the evidence that there was no change made in the prices. They continued all the way through.

Now, it is true that there is evidence that [355] some new services, new varieties of beverages were perhaps furnished, and prices were established on those that hadn't been in existence theretofore.

Mr. Cades: No, your Honor. I don't think that is accurate. The evidence is that in the prices of a drink like vodka which was established during the base period, a great quantity more was sold during the compliance period and that is what threw off these figures. But the price remained the same.

The Court: I didn't have vodka in mind but it seems to me there was evidence as to some service charges that hadn't theretofore been made, was there not?

Mr. Cades: No, there isn't. On that the evidence, too, your Honor, was absolutely clear that it included in these sales of $97,779.64 services in the form of minimum charges for entertainment, and that minimum charge for entertainment was also reflected during the compliance period, and that the minimum charge remained exactly what it was during the base period.

The Court: During all these eight months—this

eight months period was there no new service introduced?

Mr. Cades: There is absolutely no evidence of that of any kind, your Honor.

The Court: I was under the impression that there had been evidence of that. [356]

Mr. Cades: Well, if there is any misunderstanding—I am perfectly certain. I followed the evidence so clearly and the only evidence of service had to do with setups, ice and entertainment, and the evidence is quite clear that those fixed prices remained the same.

I don't want to argue it again, but before your Honor gives ultimate judgment I can't say with any more vehemence than I have done that there can't posibly be any justice in including in sales something related to entertainment without also including the cost thereof.

The Court: I certainly agree on that, but where are you going to include that cost? You can't put it in the cost of the liquor.

Mr. Cades: Here is the way you do it. I mean, this is exactly——

The Court: I see it on the board.

Mr. Cades: Here are the direct items (indicating) that produce this, both in the base period, and as long as you are consistent in applying this in the compliance period you are not out of compliance.

The Court: It depends on what the compliance is, whether it is compliance with what you call the justice that is or should be in the thing, or whether it is compliance with this rule that was adopted and worked under.

Mr. Cades: I am not arguing the injustice of the [357] rule. I am going to give notice, your Honor, in due time that this will be taken to the Court of Appeals. The statute that covers that, I want to call to your Honor's attention I am not arguing that. I am trying to avoid arguing either injustice or unfairness of the rule.

My argument is applied to the fact that with someone that already has prices in existence during a base period that haven't been changed, that after July 31, 1951, it was improper for the Commissioner or for you, the Court, in reliance on anything that the Commissioner did, to compel the Niumalu Hotel to roll their prices back to less than they were, because Congress said that you shan't do it.

It isn't disguised by merely putting it into a bulk figure. This bulk figure arises because places are charged for commodities. The cost of materials arises because you sell vodka and you sell gin, and they are sold at prices, and it is the sale of that product and the price that gives rise to a cost of material. All that you are doing is to say that it is all disguised in this composite ratio.

The Court: I say, so far as this rule that you were working under, that is the thing that I am concerned with, and I can't go beyond the rule. I may agree with you 100 per cent as to the fairness and the just dealing of the thing, but here is the rule. You are working under the rule. I am bound by the rule. [358]

Mr. Cades: I start with that assumption, your Honor, but in the words of the Supreme Court you

are not an automaton, as Justice Frankfurter has said, you are only bound by the rule if in application to the facts it can be made to apply.

Now, they haven't answered, and you Honor apparently is satisfied without an answer. If this were in the automobile business and you tried to apply a composite profit for automobiles, spark plugs, gasoline and all the rest, it would be quite obvious that that composite profit would be meaningless. It isn't obvious to your Honor because it is a large item, a bill of fare, and they have prices for entertainment, for swimming pool, and for all the different services, and then it doesn't become obvious that it is impossible to apply a composite ratio profit. But no matter whether your Honor can see it or not your Honor certainly can read the statute that says that Congress——

The Court: I have read it several times.

Mr. Cades: I know, but Congress says that after July 31, 1951, that no agency of the government can compel the Niumalu Hotel to push its prices back. They prohibit that. How can it be enforced?

Mr. Perham: Just a minute. Let's read the statute. If you are going to refer to that I insist upon it being read word for word.

The Court: I recall it. [359]

Mr Perham: It is very clear.

The Court: And they didn't push their prices back, as defense counsel said. And the thing that always has impressed me that this is not a government of men but a government of law, of course that applies to judges just the same as it does to

administrators, and I can't help but feel bound by applying this to rule 11.

You pointed out many faults in its working application, and it did not work here. And so far as this Court taking the facts on that basis, that the Court is bound by that rule being the law, and the evidence shows that it did not work, I can see no escape from the duty to find for plaintiff.

The figures are not disputed so far as I have any knowledge, that there was an excess of $3,692.86 during the first compliance period of four months, and an excess of $8,014.44 during the succeeding four months, making a total excess of $11,707.30, and I feel in duty bound to find for the plaintiff and against the defendant in that gross sum of $11,707,30.

As to the matter of penalty for failure to comply, the government is asking for three times. I feel that that is a matter of discretion with the Court. That is the way I construe the law, although the law is a little ambiguous as to that discretion. But I am going to exercise my discretion. This is an initial case of this kind here and no other case [360] has been pointed out to the Court except one that counsel for the plaintiff mentioned of which he had no full particulars, just some kind of a hurried summary of what it was about in dealing with this regulation 11.

I don't want by any means to establish any precedent in this case as to a course that the Court might follow in any subsequent cases. I do feel quite definitely that the defendant when he knew he was not

in compliance, that he assumed an attitude of either some indifference or defiance and didn't do anything to try to correct it by getting nearer to compliance in the second period. I feel that he ought to be punished for some extent for that, but not severely in this case because I have no doubt that he was acting under the view that this law is just not operable and it is unlawful and that it shouldn't and can't be enforced. I think probably he was sincere in that view, but in my opinion he was wrong as to taking that attitude. I find and fix a penalty for damages in not taking practical precautions in an endeavor to comply with CPR 11 a penalty of $500.

I have no doubt and I rather have hopes that this case will be carried to a higher Court of more judges to consider it, and most of all I would like to have more combined wisdom applied to it than just one man. But it won't make much difference what penalty I may fix. If I am wrong as to the application and legality of the law in the case before us [361] it doesn't matter as to what I feel should be the penalty.

Mr. Cades: Your Honor, at this time, I happen to know that your Honor is leaving, and there are some matters that would have to be brought to your Honor's attention.

For one thing, we would like to give notice of our intention to file a motion for new trial. We want to limit that to certain items that I feel are revealed by your decision which I think could be clarified, your Honor, on the evidence. But anyway that will take its normal course.

The Court: Pardon the interruption, but many things I have mentioned were just rather incidental. Don't attach too much importance to some of the little points that I had mentioned that I had in mind as being disclosed by the evidence.

Mr. Cades: I know your Honor won't misunderstand what counsel has said. He has been in the Court for so many years and I know your Honor's thorough conscientiousness.

It is just that I feel on a motion for a new trial there is one item under the statute that ought to be carefully considered by your Honor, and that is the so-called roll back. I think I can establish that. But be that as it may, we will also ask leave under Section 2108, Subsection (e), after the findings have been found and the judgment has been entered, that statute provides within five days we may file for a stay in order to file a complaint with the Emergency Court of [362] Appeals. And it is the intention of the complainant to file such complaint with the Emergency Court of Appeals, where the validity of the entire regulation can be considered.

The Court: Yes.

Mr. Cades: We state the hope to government Counsel that that trial may take place in Honolulu rather than in Texas.

Mr. Perham: We hope so, too.

The Court: One of the members of that Court was through here the other day. He is in Samoa now and he will be back here in a few days.

Mr. Cades: Maybe it would be possible to arrange a docket here because under that statute they

can sit anywhere in the United States, and I think it would be a matter of terrific convenience.

The Court: Yes, they haven't thus far sat out here and I think it might be agreeable.

Mr. Blissard: The Court may be interested to know that the Emergency Court of Appeals was to have come out here in June. The Territory of Hawaii had noted an appeal from one of our rulings and the Court was coming out here to hear that appeal. However, that has been cancelled, but it merely indicates that we might be able to get them to come.

The Court: I see. I didn't know that.

Mr. Cades: I feel that with the government and the [363] cooperation of the Court we might be able to get that hearing here to determine the validity of that. But this has no legal significance except to state our intentions so your Honor's calendar can be arranged accordingly.

The Court: The fact that I am away, I will be in communication at frequent times with Judge McCormick. He is still sitting in the Lower California District Court. He has been serving there right along and maintaining his office and secretary. Any communication addressed to me in care of that Court and Judge will reach me promptly most any time.

I am sure that Judge McLaughlin could take care of any peremptory matter in this Court.

Mr. Cades: Well, your Honor, I would hesitate in a matter of a motion for new trial. I really have some conviction about that.

The Court: Yes. That is a different thing.

Mr. Cades: I think your Honor ought to hear it.

The Court: Yes, but I thought on a matter of extending time or anything of that sort.

Mr. Cades: Yes.

The Court: So far as I know there is nothing more at the present time for me to do in the case, only to say over again I think that the case was about the most fairly presented on both sides of any case I have sat on for a long time. [364]

The argument in support of the defendant's theory was not only interesting but enlightening and informative to me. Not that the plaintiff's argument wasn't clear enough but that side of it seemed to come to me clearer than the other.

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In the United States District Court for the
District of Hawaii
Civil No. 1138

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ASSOCIATED HOTELS (Hawaii), LTD., a Corporation d.b.a. NIUMALU HOTEL,
Defendant.

TRANSCRIPT OF PROCEEDINGS

In the above-entitled matter, held in the U. S. District Court, Honolulu, T. H., on August 6, 1952.

Before Hon. J. Frank McLaughlin, Judge.

Appearances:

BENJAMIN A. PERHAM, JR.,
Special Assistant U. S. Attorney,
Appearing for Plaintiff;

LOUIS B. BLISSARD,
Territorial Enforcement Director,
Appearing for Plaintiff;

J. RUSSELL CADES, of the Law Firm of
SMITH, WILDE, BEEBE & CADES,
Appearing for Defendant.

The Clerk: Civil No. 1138, United States of America versus Associated Hotels (Hawaii), Ltd., a corporation doing business as the Niumalu Hotel, called for hearing on motion to vacate the ruling.

The Court: Very well. Are the parties ready?

Mr. Cades: Ready for the defendant.

Mr. Perham: Ready, your Honor.

The Court: Very well. As you have been advised, I can only give you an hour. So please make the best of it. I will also say that I have read your memorandum in relation to the motion that is pending. I notice that you cite no cases.

Mr. Perham: That is right, your Honor.

The Court: I have also had my law clerk check the OPA Act and I find that 2109 (c) of Title 50 Appendix is substantially the same as the OPA law, and further, that there never has arisen any litigation involving the phrase upon which you so heavily rely, namely, unless the buyer is otherwise not

entitled to bring the action or specifically "is not entitled for any reason to bring the action."

But that is a beautiful phrase that has been in OPA acts and this act but has never been defined. For your guidance I would say it at least assumes that there is an action and for some reason that the buyer that has been overcharged has lost his right to pursue it, and hence it is inherited by Uncle Sam.

With those disclosures as to the way I am presently approaching this motion you may proceed and I will listen, but please come directly to grips with the essential problem.

Mr. Perham: Yes, your Honor.

The Court: I say that because there is a point in here that you made which is rather academic. I can't put my finger on it now, but it is a very nice point, but it is academic.

Mr. Perham: Well, as I see it, your Honor, we have these two problems: One is whether the fact that the regulation purports to set a ceiling price precludes anyone having a cause of action under that regulation; and secondly, is the cause of action which the government seeks to assert at this time derivative.

Speaking of the first point first, the regulation itself does say that you cannot sell any meals, food items or services at prices which reflect a lower food cost per dollar of sales than is permitted by this regulation. That is Section 2.

Section 3 then states you must fix your prices so as to maintain during each four months period, beginning April 1, 1951, no lower food cost per dollar

of sales than you had in your base period. It then defines food cost per [2*] dollar of sales.

The statute itself doesn't speak of ceiling prices, but rather only of a ceiling or ceilings, for it says——

The Court: And the OPA Act didn't talk about ceiling prices or maximum prices. It talked in similar language to this, only used the maximum prices, didn't it?

Mr. Perham: Maximum prices, but here the word "prices" is excluded from the act entirely.

The Court: Are you sure you and I are quoting correctly the OPA Act?

Mr. Perham: I am not sure that I am.

The Court: I don't have it before me but my law clerk advised me that the phrase is similar to that grammatically. I agree with you this 2109 doesn't say ceiling price. It says ceiling or ceilings.

Mr. Perham: Yes, ceiling or ceilings.

The Court: And the regulation says that it sets ceiling prices. The quarrel as to that is it doesn't do what it says. It says one thing but it can't do it in the manner in which it attempts to.

Mr. Perham: Well, let us assume, your Honor, that the regulation doesn't, for the sake of argument, set ceiling prices. Let us assume that it purports to. It seems to me that the fact it may misuse the term "prices" when it says you can only charge that which reflects the same ratio as in [3] your base period, even assuming that it misuses the word

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"prices," I don't see how that has misled the defendant in any respect.

Let us assume that the regulation simply says this, leaving the word "prices" out, you must maintain during each four month period, beginning April 1, no lower food cost per dollar of sales than you had in your base period. Leave the word "prices" out of there.

Now, it sets a ceiling. A ceiling is simply a level above which you cannot go. It is a very general term. It purports to cover barter, rents, wages, markups, composite markups, average markups and any and all of the situations that businessmen indulge in in the way of trade.

So it is a general term. Therefore when this regulation says that you must maintain no lower food cost than you had in your base period it does set a ceiling.

The Court: In terms of each four months.

Mr. Perham: In terms of each four months, but nevertheless I say it is a ceiling within the meaning of the word "ceiling" as set forth in the act.

The Court: All right.

Mr. Perham: Now, the act simply says if any person selling any material or service violates a regulation or order prescribing a ceiling or ceilings then he is subject to civil action, and criminal action if it is wilful. [4]

Therefore we have a situation where, granting for the sake of argument that the word "prices" shouldn't have been used there, they did nevertheless violate clearly beyond any question according

to the evidence a ceiling or ceilings. And as soon as they do that the statute comes into play and creates the cause of action.

For example, your Honor, it isn't the price regulation itself that creates the cause of action. The price regulation only says under Section 11 that persons violating any provision of this regulation are subject to the criminal penalties, civil enforcement actions and suits for treble damages provided for in the Defense Production Act of 1950. That is Section 11, your Honor.

The Court: Yes.

Mr. Perham: It purports to create no cause of action, simply says what you can and cannot do. If you violate a ceiling you come under the statute itself which says thus and so will occur if "any person selling any material or service violates a regulation or order prescribing a ceiling or ceilings"—no prices, ceiling or ceilings.

The Supreme Court has passed upon this question of what gives rise to a cause of action, the case of United States versus Hark. That was a case involving a criminal proceeding, but exactly the same problems were involved as in a civil proceeding, that is, it comes under the same part [5] of the code here. The question there was whether they could bring an action against this defendant after the regulation had been repealed, and the Supreme Court said they could, said: "Revocation of the regulation does not repeal the statute, and though the regulation calls the statutory penalties into play,

the statute, not the regulation, creates the offense and imposes punishment."

So causes of action bring us violation of the statute, and I say that the regulation is violated even if they did use the wrong word here.

All these regulations are CPR's, Ceiling Price Regulations. That applies to all the hundreds of regulations that exist. Some of them set ratios; some of them set specific ceilings, some of them set markups and various things, but they call them all ceiling price regulations, just like OPA they called them maximum price regulations.

Now, just because they use the word "price" there doesn't make the violation any the less a breach of the statute, even if they shouldn't have used the word "price." And further, your Honor, let us assume that the regulation is wrong, is unenforcible, because they use the word "price" when they shouldn't have. That merely makes the statute invalid.

A statute, as your Honor well knows, can be invalid for any one of a number of reasons: because it is not clear [6] so that people can't understand and follow it and it causes an unreasonable burden; because it is issued by the wrong authority; because it is unconstitutional. But the word "valid" includes all weaknesses in a regulation. Now, if we assume that this regulation is unenforcible because it used the word "price" when it shouldn't have, then we say it is invalid; and as soon as we say it is invalid the problem automatically comes within the exclusive jurisdiction of the Emergency Court of Appeals.

The Court: That isn't my position that you are arguing now. I am not saying that CPR 11 is invalid. I am just saying it is unintelligible.

Mr. Perham: If it is unintelligible it is invalid for the reason it is unintelligible. That's the ground of invalidity. I really honestly believe that CPR 11 is intelligible. All they have to do is fix their prices, quantities and qualities so that at the end of a four month period they don't have a lower food cost per sales than they did in the base period. Mr. Ho, according to his testimony, their own bookkeeper, said it was easy to do.

The Court: Well, in and of itself it may be intelligible. Let's assume that for the moment, but it is not keyed into 2109. As a matter of fact, during the course of prior argument mention was made of the fact that CPR 11 was abolished in the Territory contrary to the wishes of the [7] Territorial enforcement agency, but nevertheless abolished in the territory because CPR 11 was a little bit hard for people in residence in the territory who, for example, ran Saimin stands, to follow. Then mention was made later that CPR 11 was retained on the mainland for some months thereafter, but eventually when they had the source of the supply of products, as I believe you worded it—somebody did—under control, then they abolished CPR 11 on the mainland and went into the old type of ceiling price regulation in fact.

I suggest to you that out of that there occurs to me the thought that they practically copied the OPA statute but they weren't ready to operate

under it. So they got out a CPR 11 here, for example, but they forgot to notice that CPR 11 isn't geared into the enforcement provision of their statute because, as you suggested the other day—let's read the whole statute.

It goes on where you left off to say:

"If a ceiling has been violated the person who buys such material or materials for use or consumption other than in the course of trade or business may within a year from the date"—and so forth—"bring an action against the seller."

Now, I ask in relation, as we pause there in relation to CPR 11 in this case what person?

Mr. Perham: Well, in answer to that, your Honor, [8] the statute says a little further along——

The Court: All right. I will read it all with you. Go ahead.

Mr. Perham: "If a person selling any material or service violates a regulation or order prescribing a ceiling or ceilings and the buyer either fails to institute an action under this subsection within 30 days"—which is this case—"from the date of the occurrence of the violation or"—in the alternative—"is not entitled for any reason to bring the action, the President may institute such action."

Now, let us assume that the buyer couldn't at the time he purchased the drinks bring an action for that overcharge. He is therefore not entitled to bring the action, not entitled meaning not entitled to bring a successful action. Anybody can bring an action. All right. He is not entitled to bring the

action at that time, and in view of that and because of that the President of the United States can bring the action.

The Court: Go over that again, will you once again.

Mr. Perham: Yes. Assuming that a purchaser could not bring an action for a particular drink——

The Court: Because?

Mr. Perham: Because he couldn't determine the amount of overcharge——

The Court: If any. [9]

Mr. Perham: If any.

The Court: Yes.

Mr. Perham: If he couldn't do that, then by virtue of this statute the President of the United States can bring the action because the statute says that if the buyer is not entitled for any reason to bring the action the President may institute.

The Court: The trouble with that is you are assuming there is an action when there is only an action if there is an overcharge.

Mr. Perham: Your Honor, we have proven beyond any question for a period of eight months there was $11,707 overcharge according to the formula set forth in a valid regulation.

The Court: But giving rise to no action as to any particular buyer.

Mr. Perham: Therefore the buyer, having no cause of action, the President steps in.

The Court: When did the cause of action arise?

Mr. Perham: I would say as soon as the first four months period was over, and another cause of

action arose as soon as a second four months period was over.

The Court: For what overcharge?

Mr. Perham: For the total excessive consideration that the seller received over and above what he was entitled [10] to under the formula.

The Court: But that is not an overcharge to a person who bought material or service. That is resultant from the application of this formula to show that they didn't maintain the proper control, but it is different than an overcharge.

Mr. Perham: It is an overcharge to everybody, or maybe just some, but he got that much more money that he was supposed to, and the statute covers that, your Honor. It says for the purposes of this section the word "overcharge" shall mean the amount by which the consideration exceeds the applicable ceiling—not ceiling price, applicable ceiling. And it was eleven thousand dollars.

The Court: Yet the phrase upon which you rely talks about a buyer not being entitled to bring the action. Now, the conglomerate overcharge that you are talking about at the end of the four months period, the conglomerate—whatever you call it——

Mr. Perham: Composite, whatever it is.

The Court: Yes. That represents probably a million buyers.

Mr. Perham: That is correct.

The Court: There is only one cause of action that they are talking about.

Mr. Perham: Your Honor, here is one answer to that [11] that appeals to me: if at the end of the

eight months period every buyer in that place had assigned their cause of action to me I believe that I could bring a successful case against the Niumalu Hotel for $11,707. The cause of action is there. They violated the ceiling. The statute gives rise to the cause of action. The amount is definite, and just because they are assigned to a certain individual to bring the——

The Court: Let us think in terms of the statute rather than the regulation for the moment. Can we not agree that as the statute is worded Uncle Sam in his own right gets no cause of action whatsoever?

Mr. Perham: No, I don't subscribe to that because it says that if for any reason.

The Court: Is not entitled for any reason to bring the action?

Mr. Perham: Yes, the President may institute such action on behalf of the United States.

The Court: Yes.

Mr. Perham: Now, the action is that action which——

The Court: Somebody else——

Mr. Perham: ——brings from the overcharge.

The Court: Yes, but is an action that is not Uncle Sam's initially, but by reason of somebody failing to do something about it or not being entitled to do something about it Uncle Sam inherits it. It is not a primary right of his. [12]

Mr. Perham: Let us take a situation where the buyer could go to the seller and say, "I don't know what the ceiling is." Then he has no cause of action.

The Court: Wait a minute. There is a cause of action that he can't bring with clean hands.

Mr. Perham: All right. Then that is our situation.

The Court: Then Uncle Sam can bring action?

Mr. Perham: Here we have a cause of action which he can't successfully bring at the time he buys the drink because there is no amount. He doesn't know the amount.

The Court: Then there is no cause of action.

Mr. Perham: At the end of four months——

The Court: At the end of four months, but what was he charged for the highball at the Niumalu Hotel?

Mr. Perham: We do not know.

The Court: Then you can't sue.

Mr. Perham: But the President can.

The Court: On what?

Mr. Perham: He can sue for the total overcharge. And he has a right.

The Court: But the statute is in terms of a particular person being overcharged for a particular material or service.

Mr. Perham: Well, your Honor, I have some citations here. [13]

The Court: Fine. But you have a better appreciation of what is bothering me. I don't mean to be forcing you continually up against the wall, but I want you to see what it is that is bothering me.

Mr. Perham: The reason for this giving the President the right, the statute wasn't designed principally to give buyers a cause of action——

The Court: Yes, it was.

Mr. Perham: It was designed principally in my opinion, and the opinion I believe of the cases, to control prices. That was the idea. And to do that it assisted the program to have buyers go in, be entitled to go in and bring action. But Congress well knew that there were many situations where a buyer couldn't bring the action, and if he couldn't bring the action and if the President or the government couldn't bring the action, the price control would be a very ineffective sort of effort.

You have the situation where pari dilecto, a return of goods after being fraudulently purchased; accord and satisfaction; later release; that type of thing. So in all those situations the prices could hit the sky and nobody could do anything about it.

The Court: Well, is the trouble then with the Congress that wrote the statute or with the courts that try to follow what they did write? [14]

Mr. Perham: We maintain that the Congress intended that wherever an individual couldn't bring the action or was not entitled to, under the words of the act the President could.

The Court: I agree with you, but I think that begs the question, Mr. Perham, that assumes there is an action. I am trying to find out when this action came into being.

Mr. Perham: The action doesn't come into being until the end of four months. The overcharge is defined as an excessive consideration.

The Court: As a mass?

Mr. Perham: Excessive consideration over a

period of eight months was $11,707. Now, to me that spells a cause of action.

The Court: It could if the statute were worded differently, but I again submit to you that it isn't worded that way. It says that when a particular person is overcharged by someone violating a ceiling a cause of action arises, and if that person for some reason is not entitled to proceed on that action or doesn't proceed within the time limited, then Uncle Sam can in the public interest proceed on that cause of action that once belonged to the fellow who was overcharged.

Mr. Perham: Well, I don't know that I quite agree with your Honor. [15]

The Court: All right.

Mr. Perham: That is, on the fact it has to be a person to bring a cause of action there. It says that if any person selling a material or service violates a regulation or order, the person who buys such material or service for use or consumption other than in the course of trade or business can bring an action.

Now, we have a situation, let us assume, where he buys in the course of trade or business and can't bring the action. Therefore, if you can't bring it there is no valid cause of action and the statute says you can't bring it. In that case the president can.

The Court: Do you have any such cases?

Mr. Perham: It is in the statute.

The Court: Yes, but do you have any?

Mr. Perham: I believe we have, your Honor.

The Court: Where there is no cause of action

arising to and benefiting the buyer, because of that phrase.

Mr. Perham: I assume the cause of action is only that which you can recover on, and if for any reason you can't recover you don't have a cause of action. A cause of action means enforcible right.

The Court: I understand that, but you are telling me that where under this other ambiguous phrase that likewise appeared in the OPA act, that if this overcharge of a particular [16] material or service was with respect to a transaction in the course of trade or business—which bothers me in terms of understanding what it means—but anyway, if it was that kind of a transaction you agree that statute then means that this buyer had no cause of action.

Mr. Perham: Oh, yes.

The Court: But you also in the next breath say Uncle Sam can bring the action.

Mr. Perham: Precisely.

The Court: Where did the action come from if the buyer didn't get one?

Mr. Perham: Your Honor, I believe we have some cases on that. But here is the Senate Report on this. This is the OPA Act which you say is substantially the same, and this is at Page 10:

"The further provision that the Administrator may sue on behalf of the United States not only where the United States is the consumer but also if the buyer is not entitled to bring suit will apply to situations in which the buyer is barred for bad faith or for some other reason, or in which the

buyer is a purchaser in the course of trade or business * * *"

And on Page 26 they say:

"If a buyer whose seller has violated a maximum price regulation or price schedule, is not entitled to bring such action"—that is, successfully—"because he is a [17] buyer in the course of trade or business or for other reasons, the Administrator may bring such action against the seller on behalf of the United States."

The Court: I know they say that, but I still don't see where the action in point of law arises.

Mr. Perham: I have three cases here, your Honor.

The Court: All right.

Mr. Perham: 146 Fed. 2nd, Page 566, Ninth Circuit, our own circuit, in 1945. I will just read you the headnotes here, which are very clear.

Headnote No. 5 says:

"The statute authorizing Price Administrator to sue for violation of maximum price regulations where buyer is not entitled to sue should be read in conjunction with statute making buyer in course of trade or business in pari delicto with seller."

That is correct.

"Under statute making it unlawful to buy commodity in course of trade or business in violation of regulation or price schedule, buyer in course of trade or business is in pari delicto with seller and right of action vests in Price Administrator for benefit of the nation as a whole."

Now another case in our circuit, I believe, your

Honor, 182 Fed. 2nd, 489—this is 1950—headnote No. 2:

"A sham contract between buyer and seller as part [18] of a conspiracy to avoid the Emergency Price Control Act in its regulation and sale of lumber, fully executed by buyer by payment of entire over ceiling part of sales price of lumber, is a transaction malum in se in which buyer is in pari delicto with seller, and buyer cannot rescind the contract and recover monies paid thereunder."

Now, that case I see doesn't state that was a case between two individuals. But this other case, Bowles, who was the Administrator at the time, versus Glick Brothers Lumber Company, I believe says that.

In 61 Fed. Supp. 144 we have an action by the Price Administrator for treble damages and it is quite a good case. Headnote 6 says:

"That sales in course of business in excess of maximum price regulation were rescinded by buyer was no defense to action by Price Administrator against seller for treble damages."

And again page 148 the Court states:

"For example, let it be supposed that in a period of scarcity of alcoholic beverages, a dealer should sell 1,000 cases of whiskey to a purchaser at a price of $50 per case above the ceiling price of that commodity, and that only the Administrator was vested with authority to sue the seller for the overcharges and penalties. Potentially, he would be entitled to recover the sum of $150,000. [19]

"Let it then be further supposed that, subsequent

to the time at which the Administrator learned of the transaction, but before he instituted suit against the seller, both he and the purchaser, having become aware that their illegal acts had been discovered, it would indeed be anomalous if the seller could escape liability for his wrong, by arranging with his purchaser to undo their unlawful acts.

"A thief who steals his employer's funds, and who returns them to the till, upon discovery of his theft, cannot thus wipe out his crime. Neither can this defendant and one of his black market purchasers, through a rescission of their unlawful contract, put at naught the rights of the Administrator."

The Court: I understand that, and that is an instance where you at least start off with a cause of action and later they try to patch it up, but they can't do it to the prejudice of the public interest. I understand that.

Mr. Perham: If my understanding is correct, a cause of action is nothing but an unenforcible legal right. It can be given by contract, by tort, by statute. Here it is given by statute to the President of the United States.

The Court: Under certain conditions. Why?

Mr. Perham: Why? Because other persons could not go in and successfully bring action for any reason.

The Court: That comes right back to the action. [20] What action are you talking about?

Mr. Perham: Talking about the action that is given to the President. Just like in this Glick

Brothers case where the action is given to the person who bought in the course of trade or business. It says anybody who buys in the course of trade or business cannot sue, so there is no cause of action at that junction.

The Court: That isn't proceeding under this statute.

Mr. Perham: I believe it is, your Honor.

The Court: That must be under some other provision of the statute.

Mr. Perham: Well, it says a person who buys such material or service for use or consumption other than in the course of trade or business may within one year from the date of the occurrence bring the action. In the course of trade or business. Therefore they couldn't bring it, but the right still exists in the President.

In our case they couldn't prove the amount at the time of the sales, therefore they couldn't bring it. Therefore automatically it vests in the President, because if they can't bring it for any reason the President can.

The Court: Well, you are shifting your ground now, and you are maintaining these sales that you are complaining about were not purchased as material or service for use or consumption other than in the course of trade or business? [21]

Mr. Perham: They were purchased for private consumption, not in the course of trade or business, and because——

The Court: So that you aren't relying on that phrase at all.

Mr. Perham: No. I am saying it is an analogous case. In one case a man can't sue because he buys in the course of business, and in another case he can't sue because he can't prove damages at that time. He could sue if they all waited and assigned at the end of the four months period.

The Court: Assigned what?

Mr. Perham: Their cause of action.

The Court: How would they know it when they saw it? They wouldn't know when they were overcharged.

Mr. Perham: They could go right into the books and records just like we did and determine that there was overcharge according to the regulation of so much money.

The Court: As I understand this CPR 11 you could have been out of compliance for every day of the four-month period so long as you got into compliance by making the proper adjustment in your sales and volume of sales and sales prices and quantities on the last day?

Mr. Perham: Precisely.

The Court: Then how, when I looked at the books, would I know that on the first day of the four months period I was overcharged? [22]

Mr. Perham: You couldn't know at that time, but just because you can't prove a cause of action doesn't mean it may not later exist if certain events take place, and on the first day of the second four months period they then can go in and check those books, and according to a valid regulation under

the precise wording of the statute bring an action for the total amount of the overcharge.

The Court: It sounds a little ex post facto to me.

Mr. Perham: Well, ex post facto only applies to criminal acts.

The Court: This is a treble damage, very similar.

Mr. Perham: On ex post facto, your Honor, I wonder if the rule isn't that the act cannot be passed after the event occurs.

The Court: That is right.

Mr. Perham: Here the act was passed and the regulation passed prior to this man's violation.

The Court: Yes.

Mr. Perham: It is a question of proof, often of going back.

The Court: Yes, but as you interpret this regulation and this statute, and as Mr. Cades argued before, that which may be perfectly lawful today becomes hindsight four months later unlawful because somebody else did something that rendered your particular transaction out of line with [23] CPR 11, I still think that is operating backwards.

Mr. Perham: Then we assume the regulation is unreasonable, and if it is unreasonable it is invalid.

The Court: Why should the buyer be complaining if he was treated perfectly fairly by the seller?

Mr. Perham: I wonder if all sellers were treated fairly if they got eleven thousand more for those drinks than they did in their base period when we had price control.

The Court: If you will find me a buyer who will establish he was overcharged for a particular service or commodity that he purchased here, then you and I will get along nicely.

Mr. Perham: Your Honor, the figure is uncontradicted. We know they sold liquor. We know they sold it to buyers and we know they charged all of those buyers eleven thousand dollars more than the regulation provided for. I say that proves itself. Their own books show that, and the evidence is uncontradicted to that effect.

The Court: How many causes of action are you suing on?

Mr. Perham: We are suing on, I believe, just one. Of course, a cause of action is a difficult thing. Lawyers have struggled with that for a long time and have lots of trouble with it. But I say we are suing on one cause of action, that which was given to the president, because [24] there was a ceiling. It was violated and there was an overcharge. Nobody else did sue within 30 days. That alone is sufficient. If they don't sue within 30 days, then the President can.

Let us leave out this question of whether they could or couldn't. If they don't, because it is in the alternative, then the President can. To me that beyond any question whatsoever spells a cause of action. I personally wouldn't want a better cause of action than a statute like this could spell out for me. It is a wonderful cause of action, just as clear as can be.

The Court: If you can identify it.

Mr. Perham: It is in the——

The Court: Can you put your finger on it?

Mr. Perham: Well, I can't put my finger on a contract grant of action, either, if it is an oral contract.

The Court: But you can put your finger on the buyer who was overcharged.

Mr. Perham: Well, your Honor, is it vital to this question that we identify each individual buyer as long as we show an excessive price?

The Court: Under the last statement you made the President can only sue if the buyer in 30 days doesn't sue.

Mr. Perham: Precisely.

The Court: What buyer? [25]

Mr. Perham: We know that no buyer sued. We know there were buyers.

The Court: Which buyer are you representing as you come in here?

Mr. Perham: We can represent all buyers.

The Court: With respect to a particular overcharge and if you can identify all buyers you can bring as many causes of action as you have buyers who are overcharged.

Mr. Cades: Your Honor, he has omitted the word "such" every time he read this statute, such action. That word "such" is a very important word.

Mr. Peram: I am not doing it intentionally.

The Court: I know you are not. Up in the second line the person who buys such material, and so forth——

Mr. Cades: And the President may bring such action.

The Court: The President may institute such action on behalf of the United States within one year.

Mr. Perham: That is the action that the buyer fails to institute. All these buyers failed to institute action. As a matter of judicial notice we know that the actions aren't pending as records in court. We know there were buyers. We know there were overcharges. We know they failed to institute. Those are such actions that we are suing, or such causes that we are suing on.

Just exactly like a situation where men would go [26] in a store and buy suits of clothes and each were overcharged and they don't do anything about it, the President of the United States can come in on each of these things.

The Court: That is prefectly clear. No quibble about that whatsoever. I can understand that. But I can't understand when I go down to the store with you and we each buy a suit and we are perfectly well satisfied with paying the lawful price that day, to be told some time later, some four months later that we were overcharged, and though we can't sue, the President, even though we are perfectly happy as members of the public, can sue for us because after our perfectly lawful transaction something happened in that store that retroactively made our transactions on the date we bought the suits unlawful.

Mr. Perham: There was something unlawful done at some juncture or the President wouldn't sue.

The Court: But not the day you and I bought the suits. It happened sometime later in a four months period.

Mr. Peram: Don't we have lots of unlawful offenses that have to occur over a period of time? We don't have to pinpoint the exact moment when the offense occurred, do we? Transporting of a woman across the state line for immoral purposes more or less is a continuing thing. It may last four months.

The Court: But our sale is completed when we buy [27] the suit.

Mr. Perham: Incidentally in that situation, probably the actual crime doesn't occur until—they left California to go to New York, and the intent of immorality was formed in New York. Would that make the whole thing illegal and criminal?

The Court: No.

Mr. Perham: Is that incorrect, the intent has to be in California?

The Court: Yes, but we are off. Let us stick to this suit.

Mr. Perham: Well, it would be good proof of intent in California, your Honor.

The Court: Bear in mind that we have some legal representatives from the State of California present in court today, so be nice to California.

Mr. Perham: Now, your Honor, I suggest that if we have to rely on just buyers enforcing price control, price control is ineffective. The main idea is to control prices.

The Court: I am all in favor of it.

Mr. Perham: We have several cases here, your Honor, showing that is the prime purpose of these suits. I will read those. It will just take me a moment.

Here is one from the Ninth Circuit. It is 154 Fed. 2nd at Page 434. It says:

"Congress intended the imposition of damages on the [28] price violator primarily as a deterrent to the violator rather than as a method of restitution to the buyer. The provision of a $25 minimum award, regardless of the excess over the maximum, clearly shows such intent."

This was written by Judge Denman in 1946.

The Court: Well, I don't have to be persuaded too much on that matter of controlling prices and inflation I am all in accord with that.

Mr. Perham: "The buyer may not have suffered a dollar's damage above the illegal excess"—and so forth.

It says here the price violator must pay the purchaser, and the purchaser is the instrument in accomplishing the Congressional purpose of preventing inflation.

We have some other cases along that line that show that the idea, the purpose behind this is a public purpose, which I say proves that the President has this right as given by the statute, even though an this right as given by the statute, even though an individual at the time he buys the drinks may not have had. Bear that public purpose in mind. I think that shows the intent of Congress. That is in line with the Congressional reports here.

Here is another Federal case, 147 Fed. 2nd, Page

428. The purpose of the Emergency Price Control Act is stated as follows, and then it gives the purpose, namely, to control inflation.

"This describes a threatened injury to the [29] public. While private rights and interests are necessarily affected, the controlling purpose of the statute is to protect the public during the war emergency."

The Court: Why didn't they make life very simple for you and I by, if that was the controlling purpose, simply saying whenever a price regulation is violated Uncle Sam may sue?

Mr. Perham: They do say that, if the buyer doesn't sue first.

The Court: And if the buyer is overcharged.

Mr. Perham: Precisely. Now he must have been $11,000, all the buyers together.

The Court: But that isn't the way that is worded. It says the buyer and such action. So we go round and round on that same point. I subscribe to your belief that the dominant purpose of litigation is to control inflation. I will also agree that it has failed.

Mr. Perham: That it has failed? Well, that may be.

The Court: It is a matter now of controlling more inflation.

Mr. Perham: But if the government only has a third-rate of action we have to prove wilfullness beyond any reasonable doubt, and that is a difficult thing to do.

The Court: Yes. This isn't criminal. I will agree with you. [30]

Mr. Perham: As I say, I believe it is the intent of Congress to give the President this power if the customer cannot sue for any reason, because otherwise in all those situations where he can't sue our hands would be tied except in a criminal case, which as your Honor knows, is hard to prove.

The Court: Right. Well, let us hear what Mr. Cades has to say.

Mr. Cades: Well, if your Honor please, I don't think we have come to grips with the question beyond what we did at the last session. I have re-read this section I suppose at least a hundred times and the only cause of action that is referred to in the whole sections is in the first sentence. That is the cause of action. Thereafter they refer to it one place as "an action under this section," and another place as "such action," identifying it as this cause of action.

What counsel for the government overlooks are the fundamentals that we learned in law school which have been embodied in all the nomenclature of the American law institute writings, that there are certain operative acts that give rise to a cause of action. They try to define in various situations what the operative acts are. If it is a contract it is my promise and your promise. If a tort violation of a certain statute an act is committed because of actions given rise to. What the government has overlooked throughout [31] the entire case is that under the first section here there is no cause of

action unless those operative acts are performed by the seller which give rise to it, meaning a violation of an order or regulation prescribing a ceiling.

It is an act of selling and no matter whether you jiggle around the word "ceiling" or "price" from now until doomsday you can't think in terms of an overcharge without thinking in terms of price. You can't overcharge unless you have charged something that is a price at a given time and point and space by the definition of the word "price" which is in excess of an applicable ceiling.

I haven't gone to the cases very far, but I don't think you need to go very far before you discover there have been many situations where a District Court like yourself in an enforcement proceeding has not been able to find that the government had proved an overcharge. That occurs for a number of reasons.

I would like to refer to just a few that come to my attention because I think they are analogous. In one of them we have the privilege of reading from the Circuit Court of Appeals, Judge Jerome Frank in the Second Circuit, where they had a tobacco vendor up there.

He was charged in an enforcement proceeding in a Southern District Court for charging prices in excess of a ceiling that purported to fix prices as that which is no [32] higher than that of the most closely competitive seller. The government proved before the lower court that the most closely competitive seller had such prices and he had charged

in excess of those prices, and thus the cause of action.

The Circuit Court of Appeals reversed the decision or the judgment of the District Court and said no, we can't find out, they were not able to spell out the violation of an applicable price.

They said the government had failed to prove, and the burden was on them of proving that the price and the overcharge were established by that regulation, that there were sales in excess of it. Then he went on to say that the prices might nevertheless have not been higher than those of the most closely competitive seller.

In other words, in an enforcement action and applied to this case the government had first to come in and say what prices we had to charge, or at least show the prices were set or could be set at the time they were charged, that we charged in excess of that, and therefore you have a cause of action. The government hasn't done that at all. Their case consists of the fact that from a retroactive determination made four months later in a regulation which now by their own confession for the first time apparently doesn't purport to fix prices—I don't know what it purports to do. It is a device for controlling prices by discussing [33] gross profit, and the relationship between gross profit and prices is not a logical one.

I mean there are all sorts of things that can occur. There can be all kinds of reasons why the gross profit may or may not be in accordance with that regulation. No amount of argument by the

government can convert that into a cause of action which I say, and which I think your Honor has held, is indispensable under the first sentence of 2109 (c), to wit, that a person buying the material must pay a price which is in excess for the material or service, excess of that which has been fixed by a regulation.

Now let me refer to one other case. I don't think there is really any confusion about it, but this is a statement by Judge Denman which is in 158 Fed. 2nd, 826, 1947.

In this case the District Judge, Peirson Hall, had dismissed the complaint that had been brought against a lumber establishment. The basis of the dismissal was that the regulation was one of those things that didn't cover the field. It didn't cover every kind of sale in the lumber business in that kind of regulation.

Specifically the complaint alleged that certain shingles had been sold in violation of the applicable regulation. An examination of the regulation revealed that there was no applicable ceiling. If the shipment of shingles were made in certain ways and didn't cover the whole field, [34] if it was a shipment not from a mill, if it turned out to be a shipment that didn't arrive from the mill, the regulation didn't purport to set any ceiling regulation.

The government came in and proved its case that here is a sale. They were silent about where the origin of the shingles was on the theory that if the defendant had any defense it was up to him to show

that in some way they were outside the application of the regulation.

Said Mr. Justice Denman that was not so. The government failed to meet its burden of proving that that particular regulation was applicable to the particular sales, and if there was any puka in the regulation it was up to the government to show it was not included within that puka.

These may sound a little far on the analogy, but they are the closest I can come to what I consider to be the only—I have not found any regulation that roughly resembles this either under OPS or OPA.

When you have a retroactive determination that operative facts which would be perfectly legal give no rise to a cause of action become converted into a cause of action by reason of facts that transpire after the closing of a particular period, it is our contention that there cannot be a cause of action in the seller within the meaning of the first sentence of 2109 (c). If there was no cause of action within the meaning of the first sentence, why, [35] the President may not institute such action because there is no action to institute.

The Court: Mr. Perham.

Mr. Perham: If your Honor please, I will just take a moment. I want to read carefully and slowly this statute which we have been arguing about, leaving out the inapplicable parts:

"If any person selling any material or service violates a regulation or order prescribing a ceiling or ceilings, the person who buys such material or service for use or consumption other than in the

course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge."

Then jump down to the middle of the page:

"For the purposes of this section the word 'overcharge' shall mean the amount by which the consideration exceeds the applicable ceiling. If a person selling any material or service violates a regulation or order prescribing a ceiling or ceilings and the buyer either fails to institute an action under this subsection within 30 days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the President may institute such action on behalf of the United States within such one-year period . . ." [36]

We maintain that such actions, that for the total overcharge may in theory be composed of a lot of causes of action, but this is simply a lawful joinder of them. We of course emphatically say this is not a derivative action but one given to the President of the United States by the statute itself.

Mr. Blissard, my co-counsel, has a brief statement he would like to make.

The Court: Mr. Blissard.

Mr. Blissard: I think we have been missing the point very much in these arguments here that we have been talking about. I think, assuming that there was a derivative action, I think it is clear from all the case history and from the fact this thing, all the evidence we have, that it was the intention of Congress to give to the United States, to the government, the right to bring action against

violators. We have many regulations.

The Court: All right. You say it was the intent of Congress by this regulation. Why didn't they say so?

Mr. Blissard: I think they did.

The Court: Where?

Mr. Blissard: That is what I would like to point out.

The Court: Show me.

Mr. Blissard: We have many, many regulations where there is, there cannot be any right where a violation never [37] gives rise to a cause of action on the part of the buyer, that is, those regulations, or where a sale under a regulation is to someone in the course of trade or business, which has been interpreted by the cases as meaning to someone who buys for resale or to someone who buys to use in his business, as contradistinguished from the cases where the buyer buys it for his own consumption, primarily as a household item or for personal consumption not in business.

I mean, it is probably the minority of the purchases where such right ever rises in the purchaser. For that reason most sales are in the course of regular trade and business, and we are letting the tail wag the dog if we say that that provision there means that it is a derivative action. I mean, in most cases there is no question but what the government has the full and exclusive right to bring the thing, and this was added to the statute. It was brought in. Congress made that in order to encourage the consumer, the housewife and you and I.

We may go out and buy something for our own personal consumption, to cooperate with the en-

forcement of this act, by giving them an incentive to bring some action on their own behalf. But it is only a thirty-day thing and the rest of the year it is concurrent with the right of the government

But that is the only purpose of that thing, to encourage the buyer for personal use to bring that action [38] on his own behalf and assist the government in enforcing this thing. And we are allowing the tail to wag the dog if we say that just means that it is derivative action and the government cannot bring the suit unless the buyer does or could. And we still insist that the buyer cannot in this case, and I think the statute is plain on that, even of it is insisted the interpretation is wrong, the buyer could not for any reason bring it.

The Court: Be that as it may, there still has to be an original charge to somebody somewhere at some particular time.

Mr Blissard: There was an overcharge in a four months period. The original charge was over a period of time. There was no violation to the government which the government could bring suit until July 31, 1951. There was a cause. There was a markup, and a margin which they could use determined by their base period experience. That margin was exceeded, and that is what gave rise to the violation and our cause of action.

The Court: Well, I am sorry, but I am going to have to deny your motion because I can't agree with you according to law, but maybe you can convince the circuit court. If you can convince them

that I am wrong I will abide by the Circuit Court decision. Motion denied.

Mr. Cades: If your Honor please, I have not been [39] able to satisfy myself whether under the rules we should file some findings of fact. If we are I would like to ask leave in accordance with the rules to present them to the Court. There is one rule I tried to look up hastily here during the argument, but couldn't put my finger on it. It is a little bit ambiguous.

The Court: I don't quite agree. I will say this, that if the opinion or decision originally rendered in this matter by Judge Metzger was to have remained standing, then I would be inclined to view that the findings of fact submitted by the government could well be signed by someone who inherited this case, such as myself. But meanwhile pursuant to a motion for a new trial I have granted that motion, and then having the case before me on a new trial basis I have granted your motion to dismiss in point of law. So, so far as I personally am concerned, I have no findings of fact to make because I am ruling on this matter as a point of law.

That being my ruling I would not sign my name to the findings of fact which are premised on the validity of Judge Metzger's decision.

Mr. Cades: I understood that, your Honor, but what concerns me is this: Under the rule we have in prior cases where there has been evidence submitted to the Court, and a certain amount of this evidence obviously is not only [40] before this Court on a motion for new trial and the granting

of the new trial, but it should be before any appelate court because it is in the framework of facts that it is readily discernible that this regulation may set some applicable ceiling for some hot dog operation. I don't want to be in the position of discussing it except in respect to my defendant.

The Court: That is the only case that is before the Court.

Mr. Cades: But in order to bring the ruling of the Court and what our contention has been, to wit, there was no case proven against this defendant, it may be that under the applicable rules of the Court it will be desirable at least that I submit to your Honor post findings of fact, being very rudimentary, but enough to connect your finding with the actual transcript that is before the Court.

The Court: You and counsel talk it over, and whatever you want to later discuss with me I will be glad to hear you, but I don't think findings of fact are relevant to a ruling on a point of law which dismisses the action. It would seem to me that in the event of an appeal, however, that you might get together and agree upon the facts for the consideration of the Court above. Maybe that is in keeping with what you have in mind.

Mr. Cades: That might be very well, yes. [41]

The Court: Mr. Perham, I apprecite again your hard work and courtesy, and I will once again return these price regulations to you.

Mr. Perham: I can assure you they won't be returned to you again, your Honor.

The Court: You know the Ninth Circuit might return them to me, and if they do——

Mr. Perham: Well, we wish to thank you for the very thorough attention you have given.

The Court: Thank you. Now if the jury in the other case will get into their position we will start in with the other case.

(Court adjourned at 2:25 o'clock p.m.) [42]

* * *

I, Mary V. Totushek, Official Court Reporter, U. S. District Court, Honolulu, T. H., do hereby certify that the foregoing is a true and correct transcript of proceedings reported by me in Civil No. 1138, United States of America vs. Associated Hotels (Hawaii), Ltd., held in the above-named court on August 6, 1952, before the Hon. J. Frank McLaughlin.

August 28, 1952.

/s/ MARY V. TOTUSHEK.